

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-6144

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

B

CERVIA M. WEIMER,
Plaintiff-Appellant,
VS.

P/S

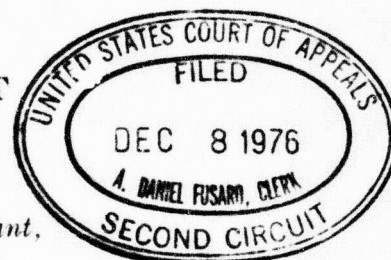
ELLIOT RICHARDSON, Secretary of Health,
Education and Welfare,
Defendant-Appellee.

In Forma Pauperis.

APPEAL FROM THE DECISION OF JUDGE BURKE, DATED
JUNE 18, 1976, GRANTING SUMMARY JUDGMENT.

BRIEF FOR PLAINTIFF-APPELLANT

EDMUND CLYNES,
Attorney for Plaintiff-Appellant,
45 Exchange Street,
Rochester, New York 14614.



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CERVIA M. WIEMER,

Plaintiff

v.

Civ-1970-132

ROBERT H. FINCH, Secretary of the
Department of Health, Education
and Welfare, Social Security
Administrator, United States of
America,

Defendant

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RECEIVED

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U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

1. Complaint
2. Summons
3. Stipulation and Order extending time to answer
4. Defendant's Answer with administrative transcript attached
5. Defendant's Notice of Motion and Motion for summary judgment
6. Stipulation re letters of Dr. John A. Pietropaoli with letters attached
7. Decision & Order
8. Defendant's Notice of Motion and Motion for summary judgment with supplemental administrative transcript attached
9. Plaintiff's affidavit
10. Decision & Order
11. Plaintiff's Notice of Appeal
12. Certified copy of Order of Court of Appeals dismissing appeal
13. Affidavit and Order granting leave to appeal in forma pauperis

C/A #76-6144

I HEREBY ACKNOWLEDGE RECEIPT
OF THE CERTIFIED COPY
ENTRIES, INDEX AND
VOLUMES OF ORIGINAL RECORD. and 1 original
copy of exhibits

Sept 23, 1976

A. DANIEL FURMANO
CLERK, U.S.D.C. 2nd Dist.

J. Brasca

EXHIBITS

1. Discharge Summary by John A. Pietropaoli, M.D.
dated 3-23-75
2. Letter dated April 10, 1976 from John A. Pietropaoli,
M.D. to Mr. Edmund Clynes

Argued by Edmund Clynes

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CERVIA M. WEIMER,

Plaintiff-Appellant,

vs.

ELLIOT RICHARDSON, SECRETARY OF
HEALTH, EDUCATION AND WELFARE,

Defendant-Appellee.

BRIEF FOR
PLAINTIFF-
APPELLANT

This action was brought by plaintiff for Social Security Benefits and denied by administrative decision.

The case was submitted to Judge Burke for decision on July 8, 1971. The plaintiff filed an affidavit of Dr. John Pietropaoli in which he states the plaintiff had been under his care since September 19, 1968. In view of that statement, Judge Burke referred the case back to the Secretary for further evidence.

After taking into consideration the additional evidence the claim for benefits was denied.

The government made a motion for summary judgment March 18, 1976 and Judge Burke in a decision dated June 18, 1976 dismissed the claim and granted a summary judgment for the government.

Point I

THE GOVERNMENT DISREGARDED THE LETTERS OF THE CLAIMANT'S PHYSICIAN. He had taken care of the plaintiff since September of 1968. In a letter dated April 10, 1976 Dr. Pietropaoli maintained that Mrs. Weimer had fractures of both legs, ankles, and wrists and has had persistent arthralgias and x-ray evidence of osteoarthritis and osteoporosis of right shoulder, humerus and

cervical spine, and she spent 10 days in the hospital suffering from intestinal bleeding. In other letters the doctor maintained she was totally disabled.

The government's proof consisted of expert witnesses who only examined the plaintiff once whereas as early as February 20, 1971 Dr Pietropaoli stated the plaintiff was completely disabled. None of the physicians were subject to cross examination.

The main case is Richardson vs Perales in 402 U. S. 389. See 85 Harvard Law Review Page 326. That case is authority for the proposition that written reports of physicians who have examined claimants for disability insurance benefits under Social Security Administration Act constitutes "substantial benefit" supporting a finding of non-disability.

The government's proof is Dr. Joseph Karp (P133); Dr. Robert C. McVeigh (T114); and Dr. Lorie Gulino (T117). (Dr. Ralph W. Prince (T120-121) stated that plaintiff was totally disabled due to arthritis.) at that time

It might be noted that no other doctor acted as her personal physician as did Dr. Pietropaoli.

Point II

There is no work record to defeat the plaintiff's claim.

This case is very much like the War Risk Insurance case of Berry vs U. S. 312 U. S. 450 at page 455. Court said :

"To justify a finding of total and permanent disability, it is not necessary that insured be bedridden and helpless, or that he should not have undertaken any work of any kind."

Considering the letters of Dr. Pietropaoli and the absence of any work record of substantial nature, it is submitted that claimant is disabled and unable to work at a gainful occupation and is unable to work at all.

Respectfully submitted,

Edmund Clynes,
Attorney for Plaintiff

AFFIDAVIT OF SERVICE BY MAIL

RE: Cervia M. Weimer

vs

Elliot Richardson, Sec. of
Health, Education & Welfare
No. 76-6144

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 12th day of October, 19 76
I mailed 10 copies of a printed Brief in
the above case, in a sealed, postpaid wrapper, to:

A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
New Federal Court House
Foley Square
New York, New York 10007

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Edmund Clynes, Esc.

45 Exchange Street, Rochester, New York 14614

Leslie R. Johnson

Sworn to before me this

12th day of October, 19 76

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77